No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

*Petitioners,*

*v.*

STATE OF INDIANA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
INDIANA SUPREME COURT

# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS


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## TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ..... iii

INTEREST OF AMICUS CURIAE ..... 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT ..... 2

ARGUMENT ..... 4

I. Eighth Amendment Review of State Forfeitures and Fines Is a Constitutionally Necessary Check on Abuse. ..... 4

A. The Excessive Fines Clause Is Precisely the Type of Constitutional Provision That Should Be Incorporated. ..... 4

B. Incorporating the Excessive Fines Clause Will Prevent Indiana, and Other States, from Ignoring an Essential Element of Ordered Liberty. ..... 10

II. The Unchecked Proliferation of Disproportionate Forfeitures and Revenue-Seeking Fines Undermines Economic Growth. ..... 11

A. Mandatory Forfeitures Are Increasingly Common and Problematic. ..... 11

**TABLE OF CONTENTS**
**(continued)**

**Page**

B. Governments Are Increasingly Misusing Mandatory Forfeitures and Fines as Revenue Streams Rather Than as Proportionate Punishments for Particular Offenses. ..... 12

C. Excessive Fines, and the Legal Uncertainty Surrounding Whether They May Be Imposed, Hinder Beneficial Economic Activity..... 23

III. As under Federal Law, This Court Should Hold That a State or Local Fine Is Excessive under the Eighth Amendment When It Is Disproportionate to the Harm Caused by the Underlying Offense. ..... 25

CONCLUSION ..... 27

## TABLE OF CITED AUTHORITIES

Page(s)

**Cases**

*Atkins v. Virginia*,
536 U.S. 304 (2002) ..... 2, 26

*Austin v. United States*,
509 U.S. 602 (1993) ..... 10

*Baze v. Rees*,
553 U.S. 35 (2008) ..... 9

*Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,
492 U.S. 257 (1989) ..... 5, 6

*Cantwell v. State of Connecticut*,
310 U.S. 296 (1940) ..... 4

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532 U.S. 424 (2001) ..... 2, 3, 8

*Ewing v. California*,
538 U.S. 11 (2003) ..... 9

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501 U.S. 957 (1991) ..... 21

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430 U.S. 651 (1977) ..... 6

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136 U.S. 436 (1890) ..... 9

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*Robinson v. California*, 370 U.S. 660 (1962) ..... 2

*Roper v. Simmons*, 543 U.S. 551 (2005) ..... 8

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463 U.S. 277 (1983) ..... 7, 10, 26

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524 U.S. 321 (1998) ..... 1, 25, 27

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217 U.S. 349 (1910) ..... 4, 26

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319 U.S. 624 (1943) ..... 27

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DNAInfo.com (Sept. 11, 2017) ..... 19

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85 Mich. L. Rev. 1699 (1987) ..... 4

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*New York Business Journal (May 26, 2017)* ..... 14

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United States, Small Business Administration, Office of Advocacy, Small Business Profile: Indiana.....24

## INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber and its members have a strong interest in ensuring a fair and predictable legal environment across the United States. Unfortunately, and with increasing frequency, state and local legislatures are authorizing – and executive officials are seeking – excessive fines and forfeitures[2] for relatively modest violations of the law by businesses and individuals. While the Eighth

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[1] Counsel of record for all parties received timely notice of the intent to file this brief and consented to the filing of the brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] Under this Court's Excessive Fines Clause jurisprudence, "[f]orfeitures—payments in kind—are . . . 'fines' if they constitute punishment for an offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

Amendment's Excessive Fines Clause restricts excessive fines arising under federal law, some jurisdictions' failure to apply that constraint to state and local governments is needlessly driving up costs for businesses, increasing prices for consumer goods and services, and undermining economic growth. The Chamber thus has a particular interest in ensuring that the Excessive Fines Clause is held applicable to the States.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Eighth Amendment prohibits "excessive sanctions." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (internal quotation marks omitted). In a series of twentieth-century opinions, the Supreme Court held much of the Bill of Rights applicable to the States, including two-thirds of the Eighth Amendment's guarantees against excessiveness. *See Robinson v. California*, 370 U.S. 660, 675 (1962) (prohibiting cruel and unusual punishments); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (prohibiting excessive bail). Consistent with these decisions, this Court affirmatively stated in 2001 that the "Due Process Clause . . . makes the Eighth Amendment's prohibition against excessive fines . . . applicable to the States" as well. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433–34 (2001). But a footnote in a more recent decision, *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 765 n.13 (2010), unsettled the issue by suggesting that the Court has yet to decide whether the Excessive Fines Clause applies to the States.

The case currently before the Court underscores why *Cooper Industries* was correct. And the disproportionate and punitive forfeiture in Petitioner's case is hardly unique. Across the country, state and local prosecutors are targeting large and small businesses for similar treatment. Newspapers and legal literature from the 1980s forward are replete with examples of large fines being handed out for even the most inconsequential violations – at great cost to businesses and their customers.

Many of the same excesses that originally led to the federal constitutional prohibition are thereby presenting themselves forcefully in states that have not recognized the Clause's incorporation. And often, state and local prosecutors have pursued excessive sanctions for the government's financial benefit rather than meting out justice fairly and proportionately to the harm caused by the underlying offense.

The solution to this problem is straightforward. The Founders recognized the judiciary as the last line of defense against legislative excess and overzealous prosecution. This Court should embrace the judicial branch's role in reviewing fines and other monetary sanctions for excessiveness. *Cooper Industries'* conclusion should be reaffirmed, and the Eighth Amendment's Excessive Fines Clause and its concept of proportionality should be held applicable to the States.

## ARGUMENT

### I. EIGHTH AMENDMENT REVIEW OF STATE FORFEITURES AND FINES IS A CONSTITUTIONALLY NECESSARY CHECK ON ABUSE.

#### A. The Excessive Fines Clause Is Precisely the Type of Constitutional Provision That Should Be Incorporated.

Individual components of the Bill of Rights are incorporated against the States where a provision is "fundamental to *our* scheme of ordered liberty" or where the right is "'deeply rooted in this Nation's history and tradition.'" *McDonald*, 561 U.S. at 767 (citation omitted); *see also Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940). Both are true here.

It is a basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). In fact, this "enduring principle" was long ago embedded into the Magna Carta, Andrew M. Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699, 1716 (1987), and reaffirmed by key thought leaders during The Enlightenment. While the "sovereign's right to punish crimes is founded . . . upon the necessity of defending the public liberty," Cesare Bonesana-Beccaria wrote in his quintessential work on crime, the "punishments [must be] just in proportion as the

liberty, preserved by the sovereign, is sacred and valuable." Cesare Bonesana-Beccaria, *An Essay on Crimes and Punishments*, at 17 (1872 ed.).[3]

The Founders learned lessons from the past, when these principles were not resolutely entrenched into law. As a result, a "primary focus" of their efforts in drafting the Constitution and Bill of Rights "was the potential for governmental abuse of its 'prosecutorial' power." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989). Based on past abuses, the Founders wanted a clear limit on "the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Id.* at 267. Among other models, the Founders turned to the English Bill of Rights of 1689, which was designed "to curb the excesses of [17th century] English judges" who were imposing "partisan" and "heavy fines on the King's enemies." *Id.*

Against this general background, the Framers of the Bill of Rights lifted the Eighth Amendment "almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived

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[3] http://lf-oll.s3.amazonaws.com/titles/2193/Beccaria_1476_Bk.pdf. Notably, "Beccaria's writings materially informed the Founding Fathers' attitudes and views of the provisions of the federal Bill of Rights." *Louis S. Rulli, Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1113 n.2 (internal quotations and brackets omitted) ("*Excessive Punishment in Civil Forfeiture*").

from the [aforementioned] English Bill of Rights of 1689." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

While Congress did not debate the Eighth Amendment's language directly to any meaningful extent in 1791, *see Browning-Ferris*, 492 U.S. at 264, contemporary advocates spoke out and wrote approvingly about its principles. For example, during the original Virginia Ratifying Convention in 1788, Patrick Henry argued that it would "depart from the genius of your country" to adopt a Constitution without a restriction on excessive fines. Patrick Henry, *Debate in Virginia Ratifying Convention*, (June 16, 1788).[4] "[W]hen we come to punishments," Henry continued, "no latitude ought to be left [to legislatures to] . . . define punishments without this control." *Id.* A prominent pre-ratification author likewise linked the importance of placing excessiveness-related constraints on both the federal and state governments:

> For the security of liberty it has been declared, "that excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. . . ." These provisions are as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing

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[4] http://press-pubs.uchicago.edu/founders/documents/amendVIIIs13.html.

> fines, inflicting punishments, . . . and seizing . . . property . . . as the other.

Louis S. Rulli, *Excessive Punishment in Civil Forfeiture*, 19 U. Pa. J. Const. L. at 1115 (quoting Brutus II (Nov. 1, 1787), as reprinted in *The Complete Bill of Rights* 621 (Neil H. Cogan, ed., 1997)).

Given this "traditional understanding of protection from excessive fines as inherent in English fundamental law, and in light of the fact that protections against 'excessive fines' are among the most ancient rights of the Anglo-American legal tradition, it can scarcely be argued that such rights are not 'deeply rooted in this Nation's history and tradition.'" Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 875 (2013) (citation omitted); *see also Solem v. Helm*, 463 U.S. 277, 284–88, 313 (1983) (observing that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century").

Historic support for incorporation is also quantifiable. By 1791, the constitutions of Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia all contained prohibitions on excessive fines, as did the Northwest Ordinance of 1787. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. at 876. And by the year the Fourteenth Amendment was adopted, 35 states – accounting for nearly 92% of the population – had incorporated their own version

of an excessive fines prohibition into their constitutions. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 82 (2008).[5]

This is why, as Petitioners detailed in their brief petitioning for a writ of certiorari (at 13-18 & n.5), many state and federal courts have concluded that it is "beyond serious dispute" that the Excessive Fines Clause applies to the States – particularly so given this Court's past statements to this effect. Just four years after seven justices signed onto the opinion in *Cooper Industries*, the Court reaffirmed in *Roper v. Simmons*, 543 U.S. 551, 560, 589 (2005), that the entirety of the Eighth Amendment "is applicable to the States through the Fourteenth Amendment." And in 2008, the Court again held that the "National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States" – including the Excessive Fines Clause – and that "all

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[5] In fact, prior to the Fourteenth Amendment, one prominent author had even argued for applying the Eighth Amendment's ban on excessive fines to the States of its own force. In his 1825 treatise, William Rawle wrote that the prohibition on excessive fines was "founded on the plainest principles of justice, and alike obligatory on the legislatures and judiciary tribunals of the states and of the United States." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 878 n.178 (2013) (quoting William Rawle, *A View of the Constitution of the United States of America* 125 (1825)).

persons within those respective jurisdictions may invoke its protection." *Kennedy v. Louisiana*, 554 U.S. 407, 412, 419, as modified on denial of reh'g, 554 U.S. 945 (2008). Other justices' individual opinions also have referred back to the Excessive Fines Clause's incorporation post-*Cooper Industries*.[6]

Discerning excessiveness is a vital judicial function. A hallmark of the American constitutional system is the creation of "an independent judiciary [as] the ultimate reliance of citizens in safeguarding rights guaranteed by the Constitution" over and beyond the legislative and executive branches. *Levine v. United States*, 362 U.S. 610, 616 (1960). This Court long ago recognized "the duty of the courts to adjudge such penalties to be within the constitutional prohibition" of the Eighth Amendment. *In re Kemmler*, 136 U.S. 436, 446 (1890). In fact, "by broadly prohibiting excessive sanctions, the Eighth Amendment [actually] directs judges to exercise their wise judgment in assessing the proportionality of all forms of punishment." *Ewing v. California*, 538 U.S. 11, 32–35 (2003) (Stevens, J., dissenting). And this Court has made clear that the responsibility lies "[u]pon the state courts, equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the constitution of the United States." *Robb v. Connolly*, 111 U.S. 624, 637 (1884).

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[6] *See, e.g., Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality); *Miller v. Alabama*, 567 U.S. 460, 503 (2012) (Thomas, J., dissenting).

### B. Incorporating the Excessive Fines Clause Will Prevent Indiana, and Other States, from Ignoring an Essential Element of Ordered Liberty.

"The purpose of the Eighth Amendment . . . was to limit the government's power to punish," with the Excessive Fines Clause forming an integral part of the Amendment's three-part framework by "limit[ing] the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris*, 492 U.S. at 265). It "would be anomalous indeed" if other sanctions under the Eighth Amendment were subject to review under federal constitutional principles but excessive fines were not. *Solem*, 463 U.S. at 289.

As detailed below, state and local prosecutors have sought to extract grossly disproportionate fines from disfavored or unpopular parties – like large corporations – who presumably have the resources to pay, rather than seeking sanctions in proportion to the harms caused by their actions. But such schemes, unbound to fundamental constitutional principles of proportionality, defeat the broader goals behind the Eighth Amendment and this Court's decision to incorporate its other clauses against the States. This Court should not allow overzealous prosecutors or legislators to effectively do away with fundamental constitutional rights.

## II. The Unchecked Proliferation of Disproportionate Forfeitures and Revenue-Seeking Fines Undermines Economic Growth.

### A. Mandatory Forfeitures Are Increasingly Common and Problematic.

Penalty statutes – and in particular here, statutes imposing fines and forfeitures – are often drafted with the worst prospective offender in mind. As commentators have noted, penalty amounts have "tended to be quite high because legislatures have used a 'worst case' mentality in setting them." Robert O. Dawson, *Sentencing Reform: The Current Round Toward a Just and Effective Sentencing System: Agenda for Legislative Reform. by Pierce O'Donnell, Michael J. Churgin & Dennis E. Curtis.* New York: Praeger Publishers, 1977. pp. xvi, 88 Yale L.J. 440, 442 (1978) ("*Sentencing Reform*"). For example, in the early 1970s, Congress passed legislation, including the Racketeer Influenced and Corrupt Organizations Act, which authorized forfeiture of property connected to the criminal enterprise. These laws – and other statutes like them in the years since – were an "'extraordinary' weapon" against those who had significant involvement in organized crime, but they did not take into account the unfairness that such "drastic" measures would have against others with less culpability. *Russello v. United States*, 464 U.S. 16, 27 (1983) (quoting 16 Cong. Rec. 819 (1970)).

The responsibility for reviewing fines to ensure that they are not grossly disproportionate to the

alleged wrongdoing lies principally with the judiciary. In fact, legislatures rely upon trial judges "to mitigate the severity of punishment in the great majority of cases." Robert O. Dawson, *Sentencing Reform*, 88 Yale L.J. at 442. And a key part of that analysis in many jurisdictions is the Excessive Fines Clause.

Incorporation of this provision imposes a duty on state courts to go beyond whether a fine is authorized under state law and ask whether it is appropriate in the actual circumstances before the court. Without this additional check, the resultant financial penalties can offend basic notions of fairness and over-compensate for the conduct the legislature was attempting to prevent in the first place.

### B. Governments Are Increasingly Misusing Mandatory Forfeitures and Fines as Revenue Streams Rather Than as Proportionate Punishments for Particular Offenses.

Fines and related forfeitures are on the rise in America, as are state and local government's reliance on – and abuse of – such enforcement mechanisms. *See, e.g.*, David J. Stone, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. Rev. 427, 429-30 (1993). In 1991, a Justice Department memorandum observed that "state and local law enforcement agencies were becoming increasingly dependent upon equitable sharing of forfeiture proceeds," with nearly $1.4 billion in assets transferred to the agencies as of 1994. Eric

Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 64 (1998). By 2017, "[f]orfeitures, particularly civil forfeitures, have become a powerful tool for the Department of Justice, as well as for local law enforcement agencies," with dollar amounts far exceeding totals from the 1990s. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures* ("*Forfeitures*"), 11 Harv. L. & Pol'y Rev. 541, 541–42 (2017).

For their part, local officials now openly boast about their profit-making enterprises and engage contingent fee private attorneys to pursue them. *See, e.g.*, Br. for *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Petitioner, *Endo Pharmaceuticals v. New Hampshire*, No. 17-633 (U.S. Nov. 30, 2017).[7] In fact, a "national study found 60 percent of the 1,400 municipal and county agencies surveyed across the country relied on forfeiture profits as a 'necessary' part of their budget." Barnini Chakraborty, *Despite Promises to Cut Back, Fed and State Governments Press Asset Forfeitures*, Fox News, Jan. 30, 2018.[8] The Las Cruces, New Mexico city attorney bragged that, through civil forfeitures:

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[7] http://www.chamberlitigation.com/sites/default/files/cases/files/17171717/U.S.%20Chamber%20Amicus%20Brief%20--%20Endo%20Pharmaceuticals%20Inc.%20v.%20New%20Hampshire%20%28U.S.%20Supreme%20Court%29.pdf.

[8] http://www.foxnews.com/politics/2018/01/30/despite-promises-to-cut-back-fed-and-state-governments-press-asset-forfeitures.html.

> "We could be czars. We could own the city. We could be in the real estate business." He detailed how police targeted nice vehicles and other desirable assets, but that they should pursue bigger fish: "This is a gold mine! A gold mine! You can seize a house, not a vehicle!"

David Pimentel, *Forfeitures*, 11 Harv. L. & Pol'y Rev. at 550.

Not only are the fines and forfeitures sought by state and federal governments massive in the aggregate, but the fines on a case-by-case are equally as staggering, sometimes reaching "into the billions of dollars against a single entity." U.S. Chamber Institute for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines* at 1 (Oct. 2015).[9] For example, the State of New York and the City of New York recently sought $872 million in penalties – and were awarded $247 million – against UPS because a small number of sellers used UPS's services to ship untaxed cigarettes. Anthony Noto, *UPS Vows to Fight $247M Penalty for Shipping Untaxed Cigarettes in New York*, New York Business Journal (May 26, 2017).[10] At the opposite end of the country, Hunt County, Texas hired private attorneys who sought approximately $2 billion

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[9] http://www.instituteforlegalreform.com/uploads/sites/1/ConstitutionalConstraints_web.pdf.

[10] https://www.bizjournals.com/newyork/news/2017/05/26/ups-vows-to-fight-247m-penalty.html.

in fines from a landowner for improperly storing a pile of wood on his property. *See* U.S. Chamber Litigation Ctr., *Grady v. Hunt Cty., Texas.*[11] In other examples, Arkansas and Louisiana retained private counsel to pursue aggressive claims against a Johnson & Johnson subsidiary, initially resulting in $1.2 billion and $330 million verdicts. *See* Br. for *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Petitioner, *Endo Pharmaceuticals v. New Hampshire* at 11. Ultimately, these verdicts were overturned and the States recovered nothing, but the final result in these two cases does not diminish the impact and enormity of the penalties that state and local governments are seeking via these types of cases. *See id.*

Moreover, business entities are frequently subject to multiple fines by different government actors for the same conduct. U.S. Chamber Institute for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines*, at 1. For example, the South Carolina Supreme Court recently upheld a $124 million civil penalty award in a case brought by the South Carolina Attorney General against Johnson & Johnson for the same purported misconduct regarding a drug that was already the subject of the company's $2.2 billion settlement with the federal government. *Id.* at 5. "If the other 49 states followed South Carolina's lead, it

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[11] http://www.chamberlitigation.com/cases/grady-v-hunt-county-texas.

would amount to over $6 billion in civil fines on top of the federal government's $2.2 billion settlement." *Id.*

Fines are also hurting small businesses, in particular, with the "explosion of civil forfeiture cases [bringing] with it persistent allegations of abuse." Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1120 (2017) ("*Excessive Punishment in Civil Forfeiture*"). For example:

> The CBS television show, 60 Minutes, highlighted the plight of Willie Jones, a black landscaper who was stopped at the Nashville airport after being observed paying cash for his airline ticket. Law enforcement authorities detained Mr. Jones and seized $9,000 in cash from his person because, according to police, he matched the profile of a drug courier. In fact, he was traveling to Texas to buy shrubs for his landscaping business and needed cash to do so. Nonetheless, police confiscated his $9,000, and released him without ever charging him with a crime. Mr. Jones sued the government to get his money back and ultimately prevailed, with the presiding judge noting that "the statutory [forfeiture] scheme as well as its administrative implementation provide[d] substantial

> opportunity for abuse and potentiality for corruption."

*Id.*

In New York City, small businesses "flooded [then-Public Advocate Bill de Blasio's] office with complaints of being hounded for minor offenses and [being] forced to pay 'excessive' fines." Jessica Dye, *NY Public Advocate Slaps City with Lawsuit over Fines*, Reuters (July 26, 2012). With the City's estimated fine revenue doubling from $400 million to $800 million in a ten-year period, de Blasio sought "answers about what this 'fine first, ask questions later' enforcement is doing to our small businesses and their ability to survive in this economy." *Id.* *See also* Erin Durkin, *Newkirk Plaza Merchants Hit with Fines as de Blasio Pushes City to Ease Up on Small Businesses*, N.Y. Daily News, Apr. 25, 2012; *Prince v. City of New York*, 108 A.D.3d 114 (2013) (explaining how the New York City sanitation police fined a carpenter/artist $2,000 and had his work-related vehicle impounded for removing "a single television antenna from the top of some curbside garbage bags").[12]

The fines have had particularly deleterious effects on New York's "[i]mmigrant entrepreneurs," who find themselves faced with a "harsh enforcement of non-critical violations [that] are creating unnecessary obstacles to small business success."

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[12] http://www.nydailynews.com/new-york/brooklyn/newkirk-plaza-merchants-hit-fines-de-blasio-pushes-city-ease-small-businesses-article-1.1067535.

Office of Bill de Blasio, *Report de Blasio: City Budgets Drowning Small Businesses in Frivolous Fines* (Apr. 25, 2012).[13] For example, one proprietor of a Korean restaurant shut his doors following "years of excessive fines" for violations concerning his dishwasher's size and an occasional broken tile. Melissa Etehad, *Small Business Owners in Flushing Say the City Unfairly Targets Them*, TheInk.NYC (Oct. 6, 2015).[14] The former restauranteur, a leader in the local business association, went on to express concern that city inspectors were taking advantage of a language barrier among immigrant entrepreneurs to issue fines without the proprietor being able to argue back or fully comprehend the regulatory requirements. *See id.*

Similar accounts of excessive fines against business owners exist all across the country. In Los Angeles, for example, the city ordered Carl's Jr. to pay $1.45 million in restitution and penalties because the fast food chain failed to pay some employees an additional $0.25 or $0.50 to meet the updated local minimum wage. James Peltz, *Los Angeles Seeks $1.45 Million from Carl's Jr. for Alleged Minimum Wage Violations*, Los Angeles Times (June 26, 2017). The total amount actually owed to the employees in back pay: $5,400.

Chicago regulations call for fines of $350 to $15,000 *per sign, per day* against small businesses

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[13] http://www.maketheroad.org/article.php?ID=2359.

[14] http://theink.nyc/small-business-owners-in-flushing-say-the-city-unfairly-targets-them/.

that post unauthorized signs like "ATM Inside" or "Breakfast, Lunch & Dinner" on the front window of their convenience store or restaurant. April Leachman, *When It Come to Sign Violations in Chicago, It's All About the Dollar Signs*, ChicagoNow.com (Sept. 11, 2017).[15] Under this policy, one Chicago dry cleaner was threatened with a $1,000 daily fine for a painted window sign that advertised wedding dress cleaning and leather repair. Alisa Hauser, *City Slaps Fines on Businesses for Putting Signs on Windows Without Permits*, DNAInfo.com (July 28, 2017).[16] While the dry cleaner took down the sign, others did not and owe significant sums to the city in penalties, interest, and administrative and collection fees. Alisa Hauser and Tanveer Ali, *As Sign Violations Spike, "Erratically Enforced" Law Questioned*, DNAInfo.com (Sept. 11, 2017).[17] Residents, community leaders, and at least one city alderman have questioned why the city is cracking down on storefront signs in light of Chicago's other pressing problems. *See* April Leachman, *When It Come to Sign Violations in Chicago, It's All About the Dollar Signs*.

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[15] http://www.chicagonow.com/chicago-on-the-radar/2017/09/when-it-comes-to-sign-violation-citations-in-chicago-its-all-about-the-dollar-signs/#image/1.

[16] https://www.dnainfo.com/chicago/20170728/wicker-park/window-signs-permits-chicago-fines-businessowners-appeal.

[17] https://www.dnainfo.com/chicago/20170911/wicker-park/sign-ordinance-chicago-business-sign-permits-law-window-signs-chicago.

And in Colorado and coastal North Carolina, businesses are fighting against excessive fines levied by state officials involving workers compensation. In one example, a Denver-based hospitality company with an annual payroll of less than $50,000 was fined $841,200 by the Colorado Division of Workers' Compensation for failure to provide the appropriate workers' compensation insurance for several years. *See* Kristen Beckman, *Penalty for Lapsed Comp Coverage Was Excessive, Court Rules*, Business Insurance (Mar. 6, 2017).[18] After "Soon Pak, owner of the company, [argued] that she would be forced to declare both personal and business bankruptcy and shut her business down if the fine was enforced," a Colorado appellate court intervened and found the fine excessive—by applying the Eighth Amendment to state proceedings. *See id.* Separately, in a scenario described as "likely 'representative of situations being faced by hundreds of small businesses across the state,'" a Corolla, North Carolina diner went to court over a similar $86,750 penalty even though the violation was remedied within days of receiving a notice letter from state officials. Jennifer Henderson, *Coastal Carolina Diner Sues State Agency over Workers' Comp Fines*, Triangle Business Journal (June 26, 2017).[19]

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[18] https://www.businessinsurance.com/article/20170306/NEWS08/912312252/Colorado-workers-compensation-fines-Dami-Hospitality.

[19] https://www.bizjournals.com/triangle/news/2017/06/26/coastal-carolina-diner-sues-state-agency-over.html.

All of these examples reflect the type of injustice the Eighth Amendment exists to prevent. "There is good reason to be concerned," Justice Scalia wrote, "that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.).[20] "Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.*

Indeed, earlier this year the Chief Justice of the Ohio Supreme Court issued a stark warning to her judicial colleagues that courts must be "centers of justice, not automatic teller machines whose purpose is to generate revenue for governments." Letter from Ohio Chief Justice Maureen O'Connor to State Judges (Jan. 29, 2018).[21] Chief Justice O'Connor continued:

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[20] Indeed, even before adoption of the Fourteenth Amendment, officials recognized the particular destructive power of fines on businesses. In an 1864 speech, Pennsylvania Senator Edgar Cowan argued that in order for a fine to be constitutional, it must "save[] . . . to the merchant his merchandise [and] to the villein his wainage." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. at 884 (citing Cong. Globe, 38th Cong., 1st Sess. 561 (1864) (statement of Sen. Edgar Cowan)).

[21] https://www.supremecourt.ohio.gov/SCO/justices/oconnor/finesFeesBailLetter.pdf.

> [C]ourt cases are not business transactions. . . . Judges and court staff cannot be seen as collection agents. Whether courts contribute to a city's bottom line or generate sufficient cash flow for its own operations should not be even a secondary thought considering the role of the judiciary in our system of government. . . . We should not be expected to engage in practices designed to maximize revenue by taking advantage of our citizens or ignoring basic constitutional standards. . . . Practices that . . . impose unreasonable fines, fees, or bail requirements upon our citizens to raise money or cave to local funding pressure . . . are simply wrong.

While a remedy for these problems might lie with state legislatures, they are not always careful guardians of constitutional rights and, in times of budgetary crisis, often look for new avenues to raise funds. Such bodies are "overstocked with lawyers" who have little interest in limiting potential sources of revenue for themselves or their private sector colleagues (in the form of assistance with forfeiture proceedings, for example). *Less Punitive Damages*, Wash. Post, July 11, 1989.[22] Moreover, legislators are often politically reluctant to discontinue a funding

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[22] https://www.highbeam.com/doc/1P2-1200624.html.

stream that substitutes financial punishment for tax increases.

Defendants also cannot always take refuge in state constitutional or statutory prohibitions on excessive fines. Not all states have excessive fines clauses. Moreover, trying to track legal developments and adjust one's business affairs based on fifty different rules for excessive fines is a prohibitively cumbersome jigsaw puzzle for many corporations to solve.

Thus, the only way that the longstanding constitutional principles underlying the Excessive Fines Clause will be applied fairly and uniformly to all businesses and individuals across this country is by a reaffirmation of incorporation by this Court.

### C. Excessive Fines, and the Legal Uncertainty Surrounding Whether They May Be Imposed, Hinder Beneficial Economic Activity.

While this case comes to the Court in the context of the State imposing a grossly disproportionate sanction on a single individual, Petitioner is not alone in seeking a fair, uniform standard. The business community and its customers are equally affected.

"Over-punishment can . . . lead to over-deterrence, where businesses become too cautious and refrain from undertaking competitive activity because of fear that the activity may be deemed" a violation of law. John Terzaken & Pieter Huizing, Allen & Overy,

*How Much Is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels*, at 6 (Spring 2013) ("*How Much Is Too Much*").[23] When corporations face the prospect of excessive financial penalties, products are "withheld from the market by lawsuit-leery companies," L. Stuart Ditzen, *Are Punitive Damage Awards Too Punishing?*, Phila. Inquirer, Oct. 29, 1989, thereby depriving businesses of profitable opportunities and consumers of the products that they might want to purchase. With over 493,000 small businesses and 1,173,626 employees of such businesses in Indiana alone, *see* U.S. Small Business Admin., Office of Advocacy, *Small Business Profile: Indiana*,[24] for example, even modest risk-based adjustments can have a significant impact.

Consumers are affected in other ways. "Excessive fines, designed to punish corporations, will more likely than not hurt consumers by requiring an excessive increase in prices as well as an excessive diversion of resources to prevention activities." Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. Rev. 395, 402 (1991). Moreover, "excessive fines may lead to insolvency . . . , which in certain markets may significantly weaken competition and ultimately hurt consumers in that market." John Terzaken & Pieter Huizing, *How Much Is Too Much* at 6.

The continuing uncertainty in the legal landscape also takes a toll. Among other things, such

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[23] http://awa2014.concurrences.com/IMG/pdf/how_much.pdf.

[24] https://www.sba.gov/sites/default/files/advocacy/IN_0.pdf.

uncertainty increases transaction costs, hinders entrepreneurial investment, and deters consumer purchases. Indeed, "[b]usinessmen . . . require the decisions of the courts on commercial issues to be predictable so that they know where they stand." L. S. Sealy and R J A Hooley, *Commercial Law: Text, Cases and Materials* at 10 (5th ed. 2003). This is particularly true here, where businesses may have their goods and services spanning jurisdictions that recognize the binding effect of the Eighth Amendment and those who do not. As the amount of the excessive fines grows, *see supra* at 12-22, businesses may need to avoid transactions in jurisdictions where businesses are treated unfairly. Such inefficiencies, caused by legal uncertainty and a patchwork of inconsistent legal regimes, do not serve businesses or consumers well.

## III. AS UNDER FEDERAL LAW, THIS COURT SHOULD HOLD THAT A STATE OR LOCAL FINE IS EXCESSIVE UNDER THE EIGHTH AMENDMENT WHEN IT IS DISPROPORTIONATE TO THE HARM CAUSED BY THE UNDERLYING OFFENSE.

When reviewing fines imposed under federal law, this Court has already held that the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. In that case, Mr. Bajakajian's reporting violation did not mask any other currency-related violations and caused no

independent harm to the government's interest. Application of the proportionality principle in the lower court resulted in a reduction of a $350,000 forfeiture based solely on the unreported funds to a $5,000 penalty.

*Bajakajian*'s holding "is deeply rooted and frequently repeated in common-law jurisprudence," *Solem*, 463 U.S. at 284 (collecting authorities), and grounded in the basic "precept of justice that punishment for crime should be graduated and proportioned to offense," *Weems*, 217 U.S. at 367. This Court has "repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment," including in proceedings arising under state law. *Atkins*, 536 U.S. at 311.

Yet this case illustrates how far state and local governments are straying from these fundamental principles. After imposing a proportional criminal fine on Mr. Timbs, Indiana imposed a statutory forfeiture in an amount arbitrarily set by the value of the car Mr. Timbs happened to be driving at the time of the offense. That type of sanction bears little relationship to the offense or the harm being remedied. While Indiana may have articulated other justifications for its forfeiture statute, it is difficult to see this type of add-on punishment as anything other than a revenue-seeking exercise.

This Court, as in *Bajakajian*, should leave it to the lower state and federal courts to make, in the first instance, judgments about whether a specific penalty is excessive under the Eighth Amendment. Consistent with *Bajakajian* and other cases, the

Chamber respectfully submits that lower courts would benefit from a reaffirmance that the standard for adjudicating excessiveness in all cases arising under the Eighth Amendment is assessing the proportionality of the forfeiture imposed to the public harm caused by the triggering violation. *See, e.g.*, *Bajakajian*, 524 U.S. at 335 (citing 1 N. Webster, American Dictionary of the English Language (1828)) (defining "excessive" as "beyond the common measure or proportion").

## CONCLUSION

Today the imperative for incorporating the Excessive Fines Clause against the States could scarcely be clearer. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). With excessive fines on the rise, and the burdens on business and individuals growing, this case presents the Court with an opportunity to conclusively resolve the incorporation question and protect all Americans' fundamental right to liberty. This Court should reverse the Indiana Supreme Court's decision and require the Eighth Amendment Excessive Fines Clause's application in state penalty and forfeiture proceedings.

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